SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA & ORS v. LATHEEFA BEEBI KOYA & ANOR

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
NALLINI PATHMANATHAN JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-01-55-02-2013]
17 NOVEMBER 2014

CRIMINAL LAW: *Corruption – Investigation – Lawyers accompanied client to Malaysian Anti-Corruption Commission ('MACC') office to give statement – MACC requested to record statements by lawyers – MACC served notice requiring lawyers' presence for oral examination – Whether notices enforceable – Whether MACC had power to take statements or testimony of lawyers who appeared with client – Whether issuance of notice done in good faith – Malaysian Anti-Corruption Commission Act 2009, ss. 16(b)(B), 30(1)(a), 30(3)(a), 46 & 72*

WORDS & PHRASES: *'person' – Meaning of – Whether includes both witness and suspect – Malaysian Anti-Corruption Commission Act 2009, s. 30*

WORDS & PHRASES: *'in his opinion' – Meaning of – Whether an officer is given discretionary power in deciding whether to call any person – Whether an uncontrolled discretion – Malaysian Anti-Corruption Commission Act 2009, s. 30(1)(a)*

The respondents were advocates and solicitors acting for one Datuk Shamsubahrin ('the client') who was summoned by the first appellant ('the MACC') to give a statement to assist in the investigation of an offence under s. 16(b)(B) of Malaysian Anti-Corruption Commission Act 2009 ('the Act'). The respondents had accompanied their client to the MACC's office. After the client's statement was taken, the MACC informed the respondents that they wanted to record their statements, to which the latter refused. The MACC served a notice under s. 30(1)(a) of the Act requiring the respondents to be present at the MACC office to be examined orally and for their statements to be recorded. The respondents filed an application for judicial review to the High Court seeking, *inter alia*, (i) an order of *certiorari* to quash the notices; (ii) a declaration that the notices were *ultra vires* and unenforceable; and (iii) a declaration that the MACC did not have the power to take statements or testimony of lawyers who appear with their client who had been ordered to attend the MACC's office for the purpose of giving statements to the MACC. The application was allowed and hence, the present appeal. The appellants submitted that (i) s. 30(1)(a) of the Act empowers an officer of the MACC investigating into an offence to order any person to attend before him for the purpose of examination, the officer is of the opinion that it might assist the investigation; (ii) the words 'in his

opinion' in sub-s. 30(1)(a) indicates that it is an empowering provision coupled with the discretionary powers to act in the manner prescribed in sub-s. 31(1)(a) and the court should not usurp the power given to the investigation officer by forming its own opinion in this matter; and (iii) there was no evidence that the issuance of the notice was done otherwise than in good faith and as such, the appellants were protected from any civil suit under s. 72 of the Act.

Held (dismissing appeal)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The word 'person' in ss. 30(1)(a) and 30(3)(a) of the Act includes both witnesses and suspect. Thus, a person who may be ordered to attend pursuant to a s. 30(1)(a) notice may be a witness and/or a suspect. The respondents were neither witnesses nor suspects. They had only accompanied the client at the statement recordings. There was no evidence whatsoever to show that the respondents were either potential witnesses or suspects. The only reason the MACC wanted to examine the respondents was because the respondents had insisted on being present at their client's statement recording. (paras 13, 14 & 15)

(2) Although the words 'in his opinion' in s. 30(1)(a) gives an officer the discretion to decide, the discretionary power in deciding whether to call a person is not an uncontrolled discretion to call any person he likes. Every legal power must have legal limits. A discretion should be exercised for a proper purpose and it should not be exercised unreasonably. In exercising his discretion, the officer must have regard to all relevant considerations and disregard all improper considerations. Where the discretion is wrongly exercised, it is the duty of the courts to intervene. The High Court, in a judicial review application, is duty-bound to consider whether the power under which the officer acts, a power which normally confers a broad discretion, had been improperly exercised. (paras 16, 17 & 18)

(3) The issuance of the notices was an act of intimidation and abuse of powers on the part of the appellants and was not done in good faith. There was no legal basis for the issuance of the notice. There was no evidence that the respondents had interfered with the interview. The officer had failed to have regard to s. 46 of the Act which protects privileged information or communication between the respondents and their client. Section 46 of the Act requires an application to be made to a judge of the High Court before an advocate and solicitor can be ordered to disclose information available on him. More significantly, sub-s. 46(2) categorically excludes any privileged information or solicitor-client communication. (paras 19, 20, 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden merupakan peguambela dan peguamcara yang bertindak bagi seorang yang bernama Datuk Shamsubahrin ('anak guam') yang telah dipanggil oleh perayu pertama ('MACC') untuk memberikan kenyataan bagi membantu siasatan mengenai satu kesalahan di bawah s. 16(b)(B) Akta Suruhanjaya Pencegahan Rasuah 2009 ('Akta'). Responden-responden telah menemankan anak guamnya ke pejabat MACC. Selepas kenyataan anak guam mereka diambil, MACC memaklumkan responden-responden bahawa MACC ingin merekodkan kenyataan responden-responden, yang mana tidak dipersetujui oleh responden-responden. MACC menyerahkan notis di bawah s. 30(1)(a) Akta yang memerlukan responden-responden hadir di pejabat MACC untuk diperiksa secara lisan dan agar kenyataan-kenyataan mereka direkodkan. Responden-responden memfailkan permohonan bagi semakan kehakiman di Mahkamah Tinggi memohon, antara lain, (i) satu perintah *certiorari* untuk membatalkan notis-notis tersebut; (ii) satu pengisytiharan bahawa notis-notis tersebut adalah *ultra vires* dan tidak boleh dikuatkuasakan; dan (iii) satu pengisytiharan bahawa MACC tidak mempunyai kuasa untuk mengambil kenyataan-kenyataan atau testimoni peguam-peguam yang hadir bersama anak guaman mereka yang telah diarahkan untuk menghadirkan diri ke pejabat MACC bagi tujuan memberi kenyataan-kenyataan kepada MACC. Permohonan dibenarkan dan dengan itu, rayuan ini. Perayu-perayu menghujahkan bahawa (i) s. 30(1)(a) Akta memberikan kuasa kepada pegawai MACC yang menyiasat mengenai satu kesalahan untuk memerintahkan mana-mana orang untuk hadir di hadapannya atau bagi tujuan pemeriksaan, pegawai tersebut berpendapat bahawa ia mungkin membantu siasatan; (ii) perkataan-perkataan 'pada pendapatnya' dalam sub-s. 30(1)(a) menunjukkan bahawa ia adalah satu peruntukan yang memberi kuasa dengan kuasa budi bicara untuk bertindak dalam cara yang dinyatakan dalam sub-s. 31(1)(a) dan mahkamah tidak sepatutnya mengambil alih kuasa yang diberikan kepada pegawai penyiasat dengan membentuk pendapatnya sendiri mengenai perkara ini; dan (iii) tiada keterangan bahawa pengeluaran notis dilakukan bertentangan dengan niat baik dan dengan itu, perayu-perayu terlindung daripada guaman-guaman sivil di bawah s. 72 Akta.

Diputuskan (menolak rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Perkataan 'orang' dalam ss. 30(1)(a) dan 30(3)(a) Akta adalah termasuk kedua-dua saksi-saksi dan suspek. Oleh itu, seseorang yang boleh diarahkan untuk menghadirkan diri di bawah s. 30(1)(a) notis boleh jadi seorang saksi dan/atau seorang suspek. Responden-responden bukan saksi-saksi mahupun suspek-suspek. Mereka sekadar menemankan anak

guam semasa rakaman kenyataan. Tiada bukti untuk menunjukkan bahawa responden-responden adalah saksi-saksi atau suspek-suspek. Satu-satu sebab mengapa MACC mahu memeriksa responden-responden adalah kerana responden-responden berkeras untuk hadir semasa rakaman kenyataan anak guam mereka.

(2) Walaupun perkataan-perkataan 'pada pendapatnya' dalam s. 30(1)(a) memberikan seseorang pegawai budi bicara untuk memutuskan, kuasa budi bicara dalam memutuskan sama ada untuk memanggil seseorang bukanlah budi bicara tidak terkawal dalam mana dia boleh memanggil sesiapa sahaja. Setiap kuasa perundangan mestilah mempunyai had perundangan. Budi bicara harus dijalankan bagi tujuan yang betul dan ia tidak harus dijalankan secara tidak munasabah. Dalam menjalankan budibicaranya, pegawai mestilah mengambil kira kesemua pertimbangan dan mengenepikan kesemua pertimbangan yang tidak wajar. Apabila budi bicara dijalankan dengan salah, adalah menjadi tugas mahkamah untuk campur tangan. Mahkamah Tinggi, dalam satu permohonan semakan, terikat dengan tugas untuk mempertimbangkan sama ada kuasa di bawah mana pegawai tersebut bertindak, kuasa yang biasanya memberikan budi bicara luas telah dijalankan dengan tidak wajar.

(3) Pengeluaran notis-notis tersebut adalah satu tindakan ugutan dan salahguna kuasa oleh perayu-perayu dan tidak dibuat dengan suci hati. Tiada asas undang-undang bagi pengeluaran notis tersebut. Tiada keterangan bahawa responden-responden campur tangan dalam soal jawab tersebut. Pegawai tersebut gagal mempertimbangkan s. 46 Akta yang melindungi maklumat istimewa atau komunikasi antara responden-responden dan anak guam mereka. Seksyen 46 Akta mengkehendaki agar permohonan dibuat kepada hakim Mahkamah Tinggi sebelum seorang peguambela dan peguamcara boleh diarahkan mendedahkan maklumat yang ada padanya. Lebih penting lagi, sub-s. 46(2) secara kategorinya mengecualikan sebarang maklumat istimewa atau komunikasi peguamcara-anak guam.

Case(s) referred to:

Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah [2010] 6 CLJ 142 CA ***(foll)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, ss. 17A, 37

Malaysian Anti-Corruption Commission Act 2009, ss. 16(b)(B), 30(1)(a), (3)(a), 31(1)(a), 46(2), 72

Rules of Court 2012, O. 53 r. 4

For the appellants - Suzana Atan; SFC
For the respondents - Sivarasa Rasiah (Shahid Adli Kamarudin with him); M/s Daim & Gamany

[Editor's note: For the High Court judgment, please see Latheefa Beebi Koya & Anor v. Suruhanjaya Pencegahan Rasuah Malysia & Ors [2013] 8 CLJ 855.]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

[1] This appeal relates to the power of an officer of the Malaysian Anti-Corruption Commission (MACC) investigating an offence to examine persons under s. 30 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694). On 17 November 2014, we dismissed the appeal after hearing submissions from learned counsels for the parties. We now give our reasons.

Introduction

[2] The two respondents are advocates and solicitors of the High Court of Malaya. They acted for one Datuk Shamsubahrin bin Ismail who was summoned by the first appellant (the MACC) to give a statement to assist in the investigation of an offence under s. 16(b)(B) of the Act 694. On 19 March 2012, the respondents accompanied their client to MACC's office. On their client's instructions the respondents insisted on being present throughout the recording of their client's statement.

[3] The MACC agreed to the respondents being present during their client's statement taking. However, the MACC informed the respondents of the possibility that the respondents' statements would also be recorded. After their client's statement was taken, the MACC informed the respondents that they wanted to record their statements.

[4] As the respondents refused to give any statement the MACC served on each of the respondents a notice under s. 30(1)(a) of the Act 694 ("the notices") requiring them to be present at the MACC office on 23 March 2012 to be examined orally and for their statements to be recorded. They were also notified that failure to comply with the notices may subject them to punishment of a fine or imprisonment or both.

[5] The respondents filed an application for judicial review seeking, *inter alia*, an order of *certiorari* to quash the notices, a declaration that the notices are *ultra vires* and unenforceable, and a declaration that the MACC does not have the power to take statements or testimony of lawyers who appear with their client who has been ordered to attend the MACC's office for the purpose of giving statements to the MACC.

A **Decision Of The High Court**

[6] The learned judge allowed the respondents' application and made the order of *certiorari* and declarations sought. The findings of the learned judge are predicated upon the following grounds:

B (a) The notices are a "decision" within the meaning of O. 53 r. 4 of the Rules of Court 2012 (ROC 2012) because the respondents will be left with no choice but to comply with it as non-compliance will result in the respondents committing an offence under s. 30 of the Act 694;

(b) The issuance of the notices affect the respondents by interfering with
C their rights and obligations to act as lawyers for their client;

(c) The issue whether the MACC can issue the notices to the respondents under the circumstances of the case is an issue of law;

(d) Other than the undisputed fact that the respondents were present during
D the interview of their client, there is no evidence that they had in fact interfered with the interview or impeded the investigation;

(e) There was no logic in ordering the respondents to attend to be examined in relation to the investigation under the pretext of assisting in the investigation, when they were merely lawyers acting and representing
E their client;

(f) Privileged information or communications between an advocate and solicitor and his client is protected under s. 46 of the Act 694;

(g) Lawyers must be protected from any form of intimidation and
F interference in the performance of their obligation to advice and act for clients;

(h) There is no legal basis for the issuance of the notices. In the circumstances of the case, the issuance of the notices is clearly an act of intimidation and abuse of power on the part of the MACC.

G **MACC's Submission**

[7] Before us, learned counsel for the appellants argued that the learned judge failed to consider or give any interpretation to s. 30(1)(a) of the Act 694.

H **[8]** Firstly, learned counsel submitted that s. 30(1)(a) of the Act 694 empowers an officer of the MACC investigating into an offence to order any person to attend before him for the purpose of examination if the officer is of the opinion that it may assist the investigation. It provides that any person may be so ordered, and does not preclude anybody for the purpose of
I assisting in the investigation. A person who may be ordered to attend pursuant to s. 30(1)(a) may be a witness and/or a suspect (*Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* [2010] 6 CLJ 142; [2010] 3 MLJ 193 (CA)).

[9] Secondly, whilst s. 30(1) empowers an officer to conduct his investigation into an offence, the words "in his opinion" in sub-s. 30(1)(a) indicates that it is an empowering provision coupled with the discretionary powers to act in the manner prescribed in sub-s. 31(1)(a). It is for the investigating officer to decide whether the person called to give evidence will assist in the investigation or not; the court should not usurp the power given to the investigation officer by forming its own opinion on this matter (s. 37 of the Interpretation Acts 1948 and 1967).

[10] The interpretation that would promote the purpose and object of Act 694 is that the examination of any witnesses whenever the occasion arises that the examination will assist the investigation (s. 17A of the Interpretation Acts 1948 and 1967; *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1; [2010] 2 MLJ 155 (FC)).

[11] Thirdly, there is no evidence that the issuance of the notice requiring the attendance of the respondents to assist in the investigations was done otherwise than in good faith. There is no evidence to show that it was an act of intimidation and an abuse of power warranting the notices to be rendered void and unlawful. As such, the appellants are protected from any civil suit under s. 72 of the Act 694. Section 46 of the Act 694 is not applicable to the facts and circumstances of the case.

Decision

[12] Section 30 of the Act 694 provides as follows:

> 30. Power to examine persons.
>
> (1) An officer of the commission investigating an offence under this Act may -
>
> (a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence;
>
> (b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerised data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence;
>
> (c) by written notice order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation into the offence, within the time specified by such officer; and
>
> (d) order any person to attend before him for the purpose of having his handwriting or voice sample taken.
>
> (2) ...

(3) A person to whom an order has been given under paragraph (1)(a) shall:

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall no refuse to answer any question on the ground that it tends to incriminate him or his spouse.

(4) A person to whom an order has been given under paragraph (1)(b) shall not conceal, destroy, alter, remove from Malaysia, or deal with, expend, or dispose of, any book, document, record, account or computerised data, or article specified in the order, or alter or deface any entry in any such book, document, record, account or computerised data or cause such act to be done, or assist or conspire to do such act.

(5) A person to whom a written notice has been given under paragraph (1)(c) shall, in his statement, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him, and shall not refuse to furnish or disclose the information on the ground that it tends to incriminate him or his spouse.

(6) A person to whom an order or a notice is given under subsection (1) shall comply with such order to notice and with subsections (3), (4) and (5), notwithstanding any written law or rule of law to the contrary.

(7) Where any person discloses any information or produces any book, document, record, account or computerised data or article pursuant to subsections (1), (3) and (5), neither the first-mentioned person, nor any other person on whose behalf or direction or as whose agent or employee the first-mentioned person may be acting, shall, on account of such disclosure or production, be liable to any prosecution, except a prosecution for an offence under section 27, for any offence under or by virtue of any written law, or to any proceedings or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.

(8) An officer of the commission examining a person under paragraph (1)(a) shall record in writing any statement made by the person and the statement so recorded shall be read to and signed by the person, and where such person refuses to sign the record, the officer shall endorse thereon under his hand the fact of such refusal and the reasons therefore, if any, stated by the person examined.

(9) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to 1(c), or any book, document, record, account or computerised data, or article produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a), or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), or record of examination of sample taken under paragraph (1)(d) shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court -

(a) for an offence under this Act; or

(b) for the forfeiture of property pursuant to section 40 or 41,

regardless whether such proceedings are against the person who was examined, or who produced the book, document, record, account or computerised data, or article, or who made the written statement on oath or affirmation, or against any other person.

(10) Any person who contravenes this section commits and offence.

[13] On the appellants' first point, we concur with the decision of the Court of Appeal in *Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* (*supra*) that in construing a provision in an Act, pursuant to s. 17A of the Interpretation Acts 1948 and 1967, what must prevail is a construction that promotes the purpose of the Act. Accordingly, the word 'person' in s. 30(1)(a) and 30(3)(a) includes both witness and suspect. Thus, a person who may be ordered to attend pursuant to a s. 30(1)(a) notice may be a witness and/or a suspect.

[14] We do not think that the learned judge failed to consider this point. What the learned judge found was that the respondents were neither witnesses nor suspects. The respondents only accompanied their client at the statement recording. There is no evidence whatsoever to show that the respondents are either potential witnesses or suspects.

[15] It is clear from the affidavits of the appellants that the only reason the MACC wanted to examine the respondents was because the respondents had insisted on being present at their client's statement recording.

[16] The appellants' second point relates to the exercise of discretion by an officer in deciding whether the person called to give evidence will assist in the investigation or not. We agree with the interpretation that the words 'in his opinion' in s. 30(1)(a) gives an officer the discretion to decide.

[17] Be that as it may, the discretionary power in deciding whether to call a person is not an uncontrolled discretion to call any person he likes. It has been said ofttimes that every legal power must have legal limits. It is also well-settled that it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In exercising his discretion, the officer must have regard to all

A relevant considerations and disregard all improper considerations. Where the discretion is wrongly exercised, it is the duty of the courts to intervene (*Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (FC)).

B **[18]** In this instance, the High Court in a judicial review application is duty bound to consider whether the power under which the officer acts, a power which normally confers a broad discretion has been improperly exercised.

[19] This brings us to the appellants' third point. The learned judge found that other than the undisputed fact that the respondents were present during the interview of their client, there is no evidence that they had in fact C interfered with the interview.

[20] We also agree with the observation of the learned judge that the officer had failed to have regard to s. 46 of the Act 694 which protects privileged information or communication between the respondents qua solicitors and D their client. Section 46 of the Act 694 reads as follows:

> 46. (1) Notwithstanding any other written law, a Judge of the High Court may, on application being made to him in relation to an investigation into any offence under this Act, order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to E seizure under this Act.
>
> (2) Nothing in subsection (1) shall require an advocate and solicitor to comply with any order under that subsection to the extent such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any F pending proceedings.

[21] It is abundantly clear that s. 46 requires an application to be made to a judge of the High Court before an advocate and solicitor can be ordered to disclose information available to him. More significantly, sub-s. 46(2) categorically excludes any privileged information or solicitor-client G communication.

[22] In the final analysis, we are in complete agreement with the learned judge that in the circumstances of the case, the issuance of the notices is clearly an act of intimidation and abuse of powers on the part of the H appellants. The respondents were present at their client's statement recording in their capacities as legal representatives of their client. There is nothing to indicate that the respondents are potential witnesses or suspects. Accordingly, the issuance of the notices was not done in good faith. There is no legal basis for the issuance of the notices.

I **[23]** For the foregoing reasons the appeal was dismissed with no order as to costs.